

No. 15308

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA, Appellant,

vs.

MARGUERITE MAY DONALDSON and EL-  
MIRA DONALDSON LUCKER,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.

FILED

JAN 14 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Western  
District of Washington, Northern Division

No. 3760

MARGUERITE MAY DONALDSON,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### COMPLAINT

Comes now the plaintiff and for cause of action  
against the defendant, complains and alleges:

#### I.

The jurisdiction of this cause of action is conferred upon the above entitled Court by the provisions of Title 38, U.S.C.A., Sections 445, 551 and 817.

#### II.

That the plaintiff is now a resident of the County of King, State of Washington, Western District of Washington, Northern Division, of the District Court of the United States.

#### III.

That the plaintiff is the mother of Allen Perry Donaldson, who died on or about March 24, 1952.

#### IV.

That the said Allen Perry Donaldson, as a member of the United States Naval Reserve, applied for and was granted, as of August 6, 1943, a National Service Life Insurance Policy No. N-13 801 319, in

which policy he designated as principal beneficiary his mother, Marguerite May Donaldson, and also designated as contingent beneficiary his father, William Nelson Donaldson, said policy being approved in the amount of \$10,000.00.

## V.

That the said Allen Perry Donaldson was hospitalized on September 3, 1943 for treatment of a condition diagnosed as Hodgkin's Disease and that he was discharged to limited duty on January 15, 1944. In July, 1944 he was hospitalized for follow-up examination and in August, 1944 he was discharged to duty. He was discharged honorably in October, 1945.

## VI.

That the said Allen Perry Donaldson was totally disabled from the time of discharge. That the said Allen Perry Donaldson was unable to hold any employment any length of time subsequent to his discharge from service. That he was constantly sick for various periods of time resulting in his having to give up his various types of work. That his employment was only maintained because of the willingness of his employers to take him back to work after various periods of illness. That at the time of his death, which was caused as a result of Hodgkin's disease, the said Allen Perry Donaldson was receiving one hundred per cent disability pension from the United States Government due to his service connected total disability.

## VII.

That due to the nature of the disease, it was impossible for Allen Perry Donaldson to know his condition, especially in view of the errors in diagnosis, until some time after 1948. That he was only aware of the cause of his illness at that time and therefore was in no position with respect to knowledge, to file any premium waiver application. That at the time the real cause of his illness was discovered, the knowledge was available to the defendant through the various veteran departments.

## VIII.

That the plaintiff heretofore filed a claim with the Veterans Administration, Washington, D. C., as principal beneficiary of the said insurance policy; that the claim was denied by the Disability Insurance Claims Division. That thereafter, plaintiff duly and regularly filed a notice of appeal from this denial with the Board of Veteran Appeals, Veterans Administration, Washington 25, D. C. That said appeal was denied by the Board of Veteran Appeals in a letter addressed to the plaintiff September 14, 1953.

## IX.

That the plaintiff is entitled to receive the benefits of the entire policy as the principal beneficiary under said policy as his disability began with the original inception of the disease in 1943.

Wherefore, plaintiff prays as follows:

1. For judgment against the United States of America in the full amount of the proceeds due

and payable under the said National Life Insurance policy heretofore issued on the life of Allen Perry Donaldson.

2. That the Administrator of the Veterans Administration, Washington, D. C., be directed to pay the plaintiff herein the full amount of said National Service Life Insurance Policy.

3. For attorney fees as made and provided by statute.

4. That the plaintiff have such other and further relief as to the Court may seem just and equitable.

/s/ JOHN F. DORE,

YOTHERS, LUCKERATH & DORE

Attorneys for Plaintiff

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 10, 1954.

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[Title of District Court and Cause.]

### ANSWER

The defendant, United States of America, answers the Complaint of the plaintiff and admits, denies and alleges as follows:

#### I.

The defendant admits the allegations contained in paragraphs I, II, III, IV, and V of the plaintiff's Complaint herein.

#### II.

The defendant denies every allegation contained

in paragraph VI of the plaintiff's Complaint herein.

III.

The defendant denies every allegation contained in paragraph VII of the plaintiff's Complaint herein.

IV.

The defendant admits the allegations of paragraph VIII of the plaintiff's Complaint herein.

V.

The defendant denies every allegation contained in paragraph IX of the plaintiff's Complaint herein.

For a further answer and affirmative defense, the defendant alleges:

I.

That effective August 6, 1943, the said Allen Perry Donaldson was issued National Service Life Insurance in the amount of \$10,000.00 under certificate number N-13 801 319; that premiums were paid on this insurance by deductions from the insured's service pay through December 5, 1945, and that the insurance lapsed for nonpayment of the premium due on December 6, 1945, and was never in force thereafter.

Wherefore, the defendant having fully answered the Complaint of the plaintiff herein, prays;

(1) That the Court enter judgment denying the relief prayed for in the plaintiff's Complaint.

(2) That the Court enter judgment for the de-

fendant and against the plaintiff for all of the defendant's taxable costs herein incurred.

(3) For such further relief as to the Court may seem just and equitable.

/s/ CHARLES P. MORIARTY,

United States Attorney

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney

Acknowledgment of Service Attached.

[Endorsed]: Filed February 15, 1955.

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In the District Court of the United States, Western  
District of Washington, Northern Division

No. 3760

MARGUERITE MAY DONALDSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

ELMIRA DONALDSON LUCKER,

Applicant for Intervention.

APPLICATION IN FURTHERANCE OF IN-  
TERVENOR'S MOTION TO INTERVENE  
AND FILE HER COMPLAINT IN INTER-  
VENTION

In view of the Court's ruling on the intervenor's motion to file her complaint in intervention in the



above action, which, on February 6, 1956, was denied on the grounds such motion was too late and in view of the Court's further ruling in part as follows:

1. "It may be that in the event the Court finds for the plaintiff, that an interpleader action might still be filed, I don't rule on that", and in view of the Court having found for the plaintiff and having further, in the memorandum opinion, in part, in brief, found substantially as follows: "That the insured, in the policy in question, was totally disabled from the time of his discharge from the Navy to the time of his death for the purpose of gainful occupation, and

"2. That the insured, by reason of the Navy's failure in diagnosing his illness as Hodgkin's Disease, did not know that he was totally disabled when he, in fact, was; that for this reason he did not conceive he had the right to make application for waiver of premiums on the policy of insurance sued on; that this was a circumstance beyond his control, which caused him to fail to make timely application for waiver of premiums because of total disability at the time that the policy lapsed, or at any time thereafter until his death."

Comes now the intervenor and makes the following additional showing to the Court, urging her right to intervene in the interests of expediency and justice:

#### I.

Restates the facts set forth in her original Complaint in Intervention.

## II.

States that she was married to the insured, Allen Perry Donaldson, while he was in the Navy, October 14, 1944; that as early as 1945, her husband, the insured, Allen Perry Donaldson, and his mother, the plaintiff in this action, Marguerite May Donaldson, expressed the intent to have your petitioner made beneficiary in the policy in question.

## III.

The the insured, her husband, Allen Perry Donaldson, again expressed this intent in October of 1945, when he was discharged from the Navy.

## IV.

That in September of 1948, the insured, her husband, Allen Perry Donaldson, again expressed his intent that your petitioner be beneficiary for the benefit of the minor children and when he learned at that time he definitely had Hodgkin's Disease, he did everything in his power to carry this intent into actuality by taking the matter up with the VFW, who handles these matters for veterans, and executing to them a power of attorney to do all things possible and necessary in this regard.

## V.

That from that date on to the date of his death, her husband, Allen Perry Donaldson, the insured in the policy in question, expressed this intent to her and other parties and stated that he had done everything possible to carry this into effect but that it would have to be determined after his death by Court action.



## VI.

That the plaintiff in this action, Marguerite May Donaldson, and her husband, at all times advised your petitioner's husband, Allen Perry Donaldson, the deceased and insured, that his desires would be effected, if possible, by instituting suit after his death.

## VII.

That in view of this assurance, she left the matter in the hands of the plaintiff in this action, Marguerite May Donaldson, and her husband; that she saw the plaintiff in this action, Marguerite May Donaldson, and her husband in October of 1955 and Christmas of 1955, but neither one of them mentioned that this action was pending or the trial date, and that she knew nothing about the same; that in this connection, she had a telephone conversation with the plaintiff in this action on or about January 17, 1956, talking about the children, and that the insurance and the fact that this action was set for trial on January 19, 1956 was not mentioned to her; that on or about January 18, 1956, a representative of the FBI called her on behalf of attorney John Roberts, the United States attorney handling the defense of the case, and asked her about the action to collect on the insurance; she advised him she knew nothing about it. Later on, on that date, attorney John Roberts called your petitioner on the telephone and talked to her about the action and said that he assumed she would be a witness at the time of the trial. That on that same date, your petitioner endeavored to call the

plaintiff in this action, Marguerite May Donaldson, and found that the telephone was disconnected and therefore went out to talk to her about the matter of the suit on the insurance policy. That she asked the plaintiff in this action, Marguerite May Donaldson, if she remembered Allen's wishes that the insurance was to go for the benefit of the children. She said that she did and your intervenor asked her if this was going to be done. She was evasive and stated that they had not discussed it and had not decided what to do with the money if there was a recovery. She further advised your petitioner that she did not know the exact time of the trial, which, in fact, was at 1:00 P.M. on January 19, 1956. That your petitioner then immediately called Lester Pope, attorney for the Veterans Administration, and he advised her to call an attorney to represent her; that she then immediately had her husband call Fred G. Clarke, Jr. of Clarke, Clarke & Albertson; that your petitioner, represented by Fred G. Clark, Jr. of Clarke, Clarke & Albertson, then appeared in Court and got out a Motion to Intervene and a Complaint in Intervention.

### VIII.

That the policy referred to is now and was at all times since its issuance in full force and effect; that intervenor is entitled to recovery of the proceeds upon the death of her husband while said policy was in force and effect.

Wherefore, intervenor prays for judgment

against the defendant in the sum of \$10,000.00 and costs of this action.

CLARKE, CLARKE &

ALBERTSON,

Attorneys for Intervenor

Acknowledgment of Service Attached.

[Endorsed]: Filed February 14, 1956.

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[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF COMPLAINT  
IN INTERVENTION

State of Washington

County of King—ss.

Elmira Donaldson Lucker, being first duly sworn on oath deposes and says as follows:

That on October 14, 1944, she was married to Allen Perry Donaldson, then in the United States Navy. That shortly prior to this time, he had been ill, which illness was diagnosed as Hodgkin's Disease. That in the summer of 1944, he had a physical recheck by the Navy at Sand Point and was given a clear bill of health and advised that he did not have Hodgkin's Disease; that since he was apparently all right physically, your affiant and Allen Perry Donaldson were married on October 14, 1944.

That in early 1945, Marguerite May Donaldson, the mother of Allen Perry Donaldson, advised him, in the presence of affiant, to change the beneficiary

on his National Service Life Policy to your affiant, and Allen Perry Donaldson at that time expressed his intention to change the beneficiary to your affiant. In October of 1945, when her husband, Allen Perry Donaldson, was discharged from the Navy, apparently with a clean bill of health, he again advised her of his intention that she be the beneficiary under his National Service Life Policy.

That in September 1948, when her husband, after rediagnosis at the Veterans Hospital at Vancouver, Washington, was advised he had Hodgkin's Disease, he again expressed his intention of rechecking his National Service Life Policy rights, to back pay, and total disability; and both he and his father, while residing at 1113 Aurora Avenue, the home of his parents, stated to her, in the presence of the plaintiff, Marguerite May Donaldson, that they were going down to the VFW to check rights to insurance, changing the beneficiary to her for the benefit of the children, rights to back pay and rights to total disability. That in September of 1948, in furtherance of this, Allen Perry Donaldson executed a Power of Attorney to the VFW, Form P22, on September 22, 1948, to do all things possible for him in this connection. That at this time, her husband advised her that there was nothing further he could do; that suit would have to be brought after his death to determine the questions in connection with the insurance.

That in June of 1949, her husband, Allen Perry Donaldson, at a time when they were living on Queen Anne Hill, again stated to her that he was

going to check with the VFW in connection with the insurance, and advised her that there was no change in the status; that it was his understanding that suit would have to be brought after his death.

That her husband, Allen Perry Donaldson, the insured in the policy in question, was bed-ridden in bad shape from October, 1951 until his death March 24, 1952, at which time, they were living at Alderwood Manor. That on more than one occasion, while he was bed-ridden, in the presence of your affiant and his mother, the plaintiff in this action, and his father, he expressed the desire that suit be brought on the insurance after his death and also the further desire that it be certain that the wife and children receive the proceeds of the insurance if the suit were successful; that both the plaintiff, Marguerite May Donaldson, and her husband, in the presence of Allen Perry Donaldson, and in the presence of your affiant, on these occasions, advised him not to worry; that this would be done and the matter taken care of; that on or about March 24, 1952, your affiant and the plaintiff, Marguerite May Donaldson, and her husband, went to the Veterans Hospital in connection with the death of her husband, Allen Perry Donaldson; that at that time, the husband, Mr. Donaldson, in the presence of the plaintiff, Marguerite May Donaldson, and your affiant, stated that he was going to take care of the insurance personally and see that the wife and children were taken care of; that later on that date, March 24, 1952, the date of the death, and after the death of Allen Perry Donald-



son on that date, the plaintiff in this action, Marguerite May Donaldson, stated to your affiant that they were going to bring an action on the insurance policy and see to it that your affiant and the children obtained the proceeds of the policy if the suit was successful.

Again, in April of 1952, the plaintiff in this action, Marguerite May Donaldson, stated to this affiant that she had received a denial of the insurance claim from the Veterans Administration and stated that action would be brought and that the wife and children would get the benefits of the insurance if the action was successful. That your affiant in July, 1953, advised the plaintiff in this action, Marguerite May Donaldson, and her husband, that she was going to marry one George Luckner; that the plaintiff and her husband objected, thinking that this would give up certain rights that the children had through Social Security and the Veterans Administration; that the marriage to George Luckner took place August 21, 1953; that no benefits were lost for the minor children of your affiant and her deceased husband, Allen Perry Donaldson, since the children were not adopted by her husband, George Luckner, so that these benefits still could be received. That from the date of the marriage to George Luckner, August 21, 1953, until about October, 1955, your affiant saw very little, if anything, of the plaintiff, Marguerite May Donaldson, and her husband, Mr. Donaldson. That in October of 1955 and Christmas of 1955, this affiant took the three minor children of herself and her deceased

husband, Allen Perry Donaldson, to the home of his parents; that on these two occasions, nothing was said about the insurance claim. That your affiant next talked to the plaintiff in this action, Marguerite May Donaldson, on the telephone on or about January 17, 1956, discussing the children and a nephew. That the insurance and suit on the insurance was not discussed.

That on January 18, 1956, for the first time, your affiant heard about the pendency of the action on the insurance policy through an FBI agent calling on behalf of attorney John Roberts who was defending the action, who asked her if she knew about the suit on the insurance policy by the plaintiff in this action. She said she did not. Later on that same day, attorney John Roberts called her and said that he assumed she would appear as a witness in the trial in connection with the suit on the policy which was to be 1:00 P.M. on January 19, 1956; that your affiant was very surprised and she immediately on that same date endeavored to call the plaintiff in this action, Marguerite May Donaldson; that the phone was disconnected and she accordingly drove out to the home of the plaintiff and her husband at Alderwood Manor; that she advised the plaintiff she had heard about the suit on the insurance policy and the fact that the trial date was 1:00 P.M. January 19, 1956, the next day. Your affiant asked the plaintiff if she remembered Allen's desire in connection with the insurance proceeds that they should go to her for the benefit of the children; the plaintiff stated that she did remember; your affiant then asked her "have

you decided what you are going to do with the money if the suit on the policy is successful?"; that the answer to this question was evasive and plaintiff stated that there had been no decision made, and that the matter had not even been discussed; and also stated that she did not know the exact time of the trial and endeavored to change the subject.

That your affiant, immediately upon finding that apparently the situation was not as she thought it was and that the wishes of her deceased husband were not going to be carried out, immediately called the Veterans Administration attorney, Mr. Lester Pope, and explained the situation; that he advised the time was short and to contact an attorney; that she also called United States District Attorney John Roberts, defending this matter. He also said that the time was short. Your affiant then called attorney Fred G. Clarke, Jr., of Clarke, Clarke & Albertson, on the morning of January 19, 1956; that he accordingly prepared a Motion to Intervene and a Complaint in Intervention and appeared in Court at 1:00 stating the position of your affiant and filed a Motion for Intervention and Complaint in Intervention.

/s/ ELMIRA DONALDSON LUCKER

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ FRED C. CLARKE, JR.

Notary Public in and for the State of Washington,  
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 14, 1956.



[Title of District Court and Cause.]

## COMPLAINT IN INTERVENTION

Comes now the plaintiff and for cause of action in intervention, alleges as follows:

### I.

That she is a citizen and resident of the United States, and resides in Seattle, Washington.

### II.

That prior hereto, she was the wife of Allen Terry Donaldson, a member of the Armed Forces of The United States of America, and the named insured in the policy of insurance which is the subject matter of this complaint herein, as is more particularly set forth.

### III.

That as a result of the marriage of the plaintiff with the said Allen Terry Donaldson, there were three children born, now of the ages of six, seven and eight, all being minors, residing with plaintiff at her home in Seattle; that the plaintiff was married to the said Allen Terry Donaldson on October 14, 1944, and remained as his wife continually until his death on November 24, 1952.

### IV.

That while her deceased husband was a member of the Naval Forces of The United States, he applied for and was granted an insurance policy in the sum of \$10,000.00 insuring his life, which provided for total disability benefits in the event of

his total disability and waiver of premiums during such disability.

#### V.

That while said policy was in full force and effect, he contracted a disease known as Hodgkin's Disease, which he was advised would ultimately cause his death; that said disease totally and completely incapacitated the said deceased from engaging in any form of occupation whatsoever.

#### VI.

That when said insurance was effected by the deceased, he named his mother, the plaintiff in this action, as the beneficiary in said policy; that when he was advised that he had contracted Hodgkin's Disease, he endeavored to make application for benefits under the policy and secure premium waivers during his disability and to change the beneficiary from his mother to his then wife, the intervenor herein.

#### VII.

That he expressed the intention that he desired to change the beneficiary in the policy from his mother to his then wife, the intervenor herein and followed such expression of intention with an effort to secure a change of beneficiary under said policy, in accordance with his intention.

That though his efforts were directed at obtaining a change of beneficiary, he was advised that he had no rights under the policy and that suit would have to be brought after his death.

## VIII.

That the mother, Marguerite May Donaldson, the beneficiary under said policy, assured the intervenor herein prior to the death of her husband, Allen Terry Donaldson, and also informed her deceased son, that after recovery was made on the policy, the proceeds would go to intervenor herein for the benefit of her three minor children; that shortly after the death of the insured, intervenor was again advised by the mother of the deceased husband that the proceeds would go to the intervenor for the benefit of her children.

## IX.

That intervenor's knowledge of the pendency of this suit was unknown until the 19th day of January, 1956; that at no time was she advised that there was any action pending by her mother-in-law to collect the proceeds of this policy, and immediately intervenor brought this intervention, endeavoring to assert her rights herein; that intervenor is entitled to judgment against the defendant for the full sum of \$10,000.00, being the proceeds of said policy.

## X.

That said policy referred to is now and at all times since its issuance has been in full force and effect and intervenor is entitled to recover the proceeds upon the death of her husband while said policy was in force and effect.

Wherefore, intervenor prays for judgment against

the defendant in the sum of \$10,000.00 and costs of action.

CLARKE, CLARKE & ALBERTSON  
/s/ FRED C. CLARKE, JR.  
Attorneys for Intervenor

Duly Verified.

[Endorsed]: Lodged Jan. 20. Filed Feb. 27,  
1956.

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[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN  
INTERVENTION

Comes now the defendant, United States of America, and for answer to the Complaint in Intervention of Elmira Donaldson Lucker, on file herein, admits, denies and alleges as follows:

I.

Answering paragraphs I, II, and III, the defendant admits the same.

II.

Answering paragraphs IV, V, VI, VII and VIII, the defendant denies the same for lack of sufficient information or belief.

III.

Answering paragraphs IX and X, the defendant denies the same.

Wherefore, having fully answered the Complaint of the Intervenor, Elmira Donaldson Lucker, the

Defendant, United States of America, prays that the same be dismissed with prejudice and that the Court allow the defendant its taxable costs herein incurred.

/s/ CHARLES P. MORIARTY

United States Attorney

/s/ JOHN A. ROBERTS, JR.

Assistant United States Attorney

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 9, 1956.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before the Honorable William J. Lindberg, Judge of the United States District Court, Western District of Washington, Northern Division, on the 19th day of January, 1956; and the plaintiff having been represented by her attorneys, John F. Dore and William H. Mullen; and the defendant, United States of America, having been represented by Charles P. Moriarty, the United States Attorney for the Western District of Washington, and his Assistant, John A. Roberts; and testimony having been taken in open Court, and certain documents and evidence having been introduced and admitted into evidence; and a certain pre-trial order incorporating the stipulation of certain facts having been admitted into the record as evidence by agreement

of the parties, and also other facts and exhibits having been agreed to; and the Court having considered Memoranda of Authorities and the written and oral arguments of counsel, this Honorable Court hereby makes the following:

### Findings of Fact

#### I.

That jurisdiction of this cause of action is conferred upon the above entitled Court by the provisions of Title 38, U.S.C.A., Sections 445, 551 and 817.

#### II.

That the plaintiff, Marguerite Allen Donaldson, at the time of the filing of this complaint, was and now is a resident of the county of Snohomish, State of Washington, in the Western District of Washington, Northern Division, of the District Court of the United States. That the plaintiff is the mother of Allen Perry Donaldson, who was formerly, before his death, a member of the Armed Forces of the United States of America, namely a coxswain in the United States Naval Reserve. That Allen Perry Donaldson died on March 24, 1952. That such death is evidenced by a duly authenticated death certificate which was admitted as evidence. That cause of death was officially found to be Hodgkin's Disease. That this is a fatal disease, and according to medical testimony, no known case has ever been cured.

#### III.

That the said Allen Perry Donaldson when a



member of the United States Naval Reserve, applied for and was granted as of August 6, 1943, a National Service Life Insurance policy, No. N 13 801 319, which policy designated as principal beneficiary his mother, Marguerite Allen Donaldson, and also designated as contingent beneficiary his father, William Nelson Donaldson, said policy being approved in the amount of Ten Thousand (\$10,000.00) Dollars.

#### IV.

That the said Allen Perry Donaldson was hospitalized on September 3, 1943, while overseas at Base Hospital No. 3, for treatment of a condition which was later diagnosed, on September 11, 1943, as Hodgkin's Disease. He at that time was classified as unfit for duty. Shortly thereafter he was transferred to the Naval Hospital at Oakland, California, and there a biopsy was performed and the analysis showed Hodgkin's Disease, and verified the previous analysis made overseas. In July of 1944 the veteran was transferred into his home area, namely, to the United States Naval Hospital at Seattle, and there he was admitted as a patient for treatment and observation. It was while there that, on July 17, 1944, certain naval doctors erroneously changed his diagnosis from Hodgkin's Disease, #1402, to Lymphadenitis Cervical, #1403. He was then discharged on August 3, 1944 as fit for all duty of his rate, at sea or foreign service. Previous to this he had been assigned to limited duty. Thereafter he was discharged from the United States Naval Service on October 23, 1945, having

been examined by naval doctors, and having been found at that time to have no defects other than defective sight and defective teeth. That the medical examination on discharge was erroneous for the court finds that at the time of his discharge and at the time his insurance lapsed, the insured was suffering from Hodgkin's Disease.

## V.

That the said Allen Perry Donaldson was permanently and totally disabled for insurance purposes from the time of his discharge, on October 23, 1945, and further the court finds that at the time of his discharge and at the time his insurance lapsed, the insured had Hodgkin's Disease. That the said total and permanent disability was suffered by the veteran prior to the lapse of the insurance policy, which lapsed shortly after the time of his discharge, namely on December 6, 1945.

## VI.

And further the Court finds that the fact that he was discharged as being fit in October, 1945 would give him cause to believe that he was all right, and having been recently married, that he was about to and could begin his career after discharge from the Service, and could with the natural determination that would exist in such a situation, overcome tremendous obstacles through sheer mental effort. And further the Court finds that this permanent disability for insurance purposes continued with varying degrees of acuteness from the time he was discharged to the time of his death in 1952.



## VII.

And further the Court finds that because of the failure of the United States Navy to sufficiently examine the insured and its failure to properly diagnose the ailment of the deceased veteran at the time of his discharge in 1945, that said veteran was unaware of his fatal disease and had reason to believe that he was fit. This erroneous finding and pronouncement of the medical officer of the Navy of the insured's physical fitness, at the time of discharge on October 23, 1945, was a circumstance beyond the control of the insured and in itself probably accounted a large part for the determination of the young man to overcome whatever it was that was sapping his vitality and to cause him to fail to recognize that he was disabled, which resulted in his almost heroic efforts to take his place in life. That because of the failure of diagnosis of the disease and the resulting discharge as a fit person he was misled so that he did not make application for a waiver of premiums. The insured, because of this misleading circumstance, as the Court views it, had reason to believe that he was not totally disabled, and therefore did not conceive that he had the right to make application for the waiver of premiums. And further the Court finds that circumstances beyond his control were such as to cause him to fail to make timely application for waiver of premiums because of total disability at the time of the lapse of the policy, or at any time thereafter until his death. That there is nothing in the record that would make this veteran aware of total dis-

ability at the time of lapse of policy or before; and further there is nothing in the record to indicate that he was advised, or that he should have known, or that he actually knew, that he was continuously or totally disabled as of the date of the lapse of the policy, or any time prior to September, 1948. And further the Court finds that the circumstance beyond the insured's control is the circumstance of his discharge by the Navy as fit, after having been diagnosed previously as having Hodgkin's Disease. This finding is based upon the testimony of Dr. DeMarsh, and the medical records, namely, that he did actually have Hodgkin's Disease during all of this time.

### VIII.

And further the Court finds as stipulated between the parties that the claim for reinstatement of the insurance policy of the deceased veteran by the plaintiff was treated by the Veterans Administration and processed by the Veterans Administration as a petition for reinstatement and for waiver of premiums.

That at the time of the death of the deceased veteran he was receiving one hundred (100%) per cent disability pension from the United States Government due to his service connected total disability, namely, Hodgkins Disease.

That due to the nature of the disease, and due to the error in diagnosis by the United States Navy, it was impossible for Allen Perry Donaldson to know his condition until some time after 1948, and therefore he was in no position, with respect to

knowledge, to file any premium waiver application.

That the deceased veteran's mother, who is the plaintiff in this action, heretofore filed a claim with the Veterans Administration, Washington, D. C., as principal beneficiary of the said insurance policy; that the claim was denied by the Disability Insurance Claims Division. That thereafter plaintiff duly and regularly filed a notice of appeal from this denial with the Board of Veterans Appeals, Veterans Administration, Washington, D. C. That said appeal was denied by the Board of Veteran Appeals in a letter addressed to the plaintiff September 14, 1953.

And further the Court incorporates and makes a part of its Findings all the Admitted Facts as agreed to by the parties in a pre-trial order filed herein and admitted as evidence:

#### Admitted Facts

1. That this Court has jurisdiction of the cause.
2. That the plaintiff is a resident of Snohomish County, State of Washington, Western District of the Northern Division.
3. That plaintiff is the mother of the deceased veteran, Allen Perry Donaldson.
4. That the said veteran died on March 24, 1952; and that Hodgkin's Disease was the cause of the death.
5. That the said deceased veteran applied for and was granted, on August 6, 1943, National Service Life Insurance Policy N-13 801 319; and that he was at said time a member of the United States

Naval Reserve, serving in an active duty status in the United States Navy.

6. That said veteran did designate his mother, Marguerite Allen Donaldson, plaintiff, as beneficiary of said policy; and that he did designate and name his father, William Nelson Donaldson, as contingent beneficiary.

7. That this policy was in the amount of \$10,000.00; and that the premium thereon was \$6.40 per month, payable monthly; and that premiums were paid thereon by deductions from the insured veteran's service pay until December 5, 1945.

8. That premiums were paid to December 5, 1945, and that there were no further premiums paid on said policy thereafter.

9. That the veteran insured, Allen Perry Donaldson, died on March 24, 1952.

10. That at the time of his death, said veteran had applied for and was receiving a pension based on a 100% disability, from the United States Government due to service connected total disability, to-wit: Hodgkin's Disease, which determination of disability was made effective September 7, 1948.

11. That the mother and plaintiff, who is the principal beneficiary of said policy on the life of said veteran, did file claim for benefits thereunder, as principal beneficiary of the policy, and that she did so on October 10, 1952.

12. That said claim was denied by the Disability Insurance Claims Division of the Veterans Administration of the United States of America; because the insurance was not in force on date of death,

having lapsed for non-payment of premiums due December 6, 1945.

13. That said mother and beneficiary who is plaintiff here did thereafter appeal the denial to the Board of Veterans Appeals, of the Veterans Administration, Washington 25, D. C., and that this appeal was also denied and notice given by aid of Board to plaintiff on September 14, 1953 by letter.

14. That Allen Perry Donaldson died on March 24, 1952, at 1:30 p.m. at the Veterans Hospital in Seattle, Washington, and that the cause of death, as shown by death certificate, as official record, was Hodgkin's Disease.

15. That the veteran was serving as a Coxswain aboard the U.S.S. "Breese," DM 18, a mine layer, in foreign waters, when a shipmate noticed a swelling on the left side of his neck on the 3rd day of September, 1943; and on that same date he was taken ashore to Overseas Base Hospital No. 3 for treatment and observation by a certain Doctor Willoughby.

16. That his condition on September 11, 1943, at said Overseas Base Hospital No. 3 was analyzed as Hodgkin's Disease, #1402 and he was classified as unfit for duty.

17. That on September 14, 1943, he was transferred to the Naval Hospital at Oakland, California for treatment and disposition; that at said hospital a biopsy was performed and analysis showed that there was an early Hodgkin's Disease for which X-ray treatments were given.

18. That in July, 1944, the veteran was admit-



ted to the United States Naval Hospital at Seattle; that on July 17, 1944 certain navy doctors changed his diagnosis from Hodgkin's Disease, #1402, to Lymphadenitis Cervical, #1403. "Reason: Error."

19. That on August 3, 1944, the veteran was discharged from said hospital as fit for all duty at sea or foreign service.

20. That on October 23, 1945 the veteran was examined and found to be physically qualified for discharge from naval service; and he was released to inactive duty; and that the only defects noted on his separation physical examination was "Defective vision—caries teeth."

21. That on or about September 7, 1948, approximately three years later, he applied to the Veterans Administration for treatment and was admitted for hospitalization; that a biopsy was performed and analyzed as Hodgkin's Disease; and thereafter there was intermittent hospitalizations and treatments as an outpatient; that said veteran was under the care of Dr. Q. B. DeMarsh, M.D.; that the severity of illness increased, and on October 19, 1951. the veteran was reported seriously ill.

22. That on March 18, 1952 the veteran was readmitted to Veterans Hospital at Seattle, Washington, with a diagnosis of Hodgkin's Disease, "condition serious."

The Court makes a further Finding of Fact in connection with the complaint in intervention that the attorneys of record for the plaintiff and the attorneys of record for the intervenor have agreed, in settlement of the dispute between them, that the

judgment entered in this action shall provide that the proceeds of the insurance policy sued on in this action shall be payable as follows, after deduction of attorneys' fees:

(a) Fifty per cent (50%) to Marguerite May Donaldson; and

(b) Fifty per cent (50%) to Elmira Donaldson Lucker, as guardian of her three minor children and for the use and benefit of said children, Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson; that these payments under said policy shall be payable into the guardianship in the Superior Court of the State of Washington for King County, Cause No. 130706, in which Elmira I. Lucker has been appointed guardian of Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson, and in which guardianship proceeding the guardian is under bond for \$6,000.00 and is required to report to the Veterans Administration once a year and to the Court once every two years as to the use of all funds in said guardianship, all of which funds are for the benefit of the aforementioned three minor children.

The Court, having made these Findings of Fact, hereby makes the following

### Conclusions of Law

#### I.

That the plaintiff is entitled to judgment against the United States of America in the full amount of the policy, namely Ten Thousand (\$10,000.00) Dollars. That in accordance with a stipulation filed

of record herein by the Intervenor, Elmira Donaldson Lucker, the decree shall provide that judgment be paid in accordance therewith.

## II.

That the deceased veteran, Allen Perry Donaldson, was permanently disabled for insurance purposes on the date of discharge from the Naval Service, namely, on October 23, 1945.

## III.

That the deceased veteran, Allen Perry Donaldson, failed to apply for waiver of premiums on said policy due to circumstance beyond his control.

## IV.

That according to the statutes and decisions pertaining hereto, attorney fees for the plaintiff's attorney, John F. Dore, should be allowed in the amount of One Thousand (\$1,000.00) Dollars, payable forthwith to him from the judgment decreed.

Done in Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG

Judge

Presented by:

/s/ JOHN F. DORE

Attorney for plaintiff

Approved only as to Form:

/s/ JOHN A. ROBERTS, JR.

Assistant United States Attorney  
Of Counsel for defendant



Approved: 3/21/56.

CLARKE, CLARKE & ALBERTSON  
/s/ FRED C. CLARKE, JR.

Attorneys for Intervenor

[Endorsed]: Filed March 27, 1956.

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United States District Court, Western District  
of Washington, Northern Division

No. 3760

MARGUERITE ALLEN DONALDSON,  
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

### FINAL DECREE

This Cause having been heard in open court; and the Findings of Fact and Conclusions of Law having been made and filed herein; the files and records having been considered herein; and counsel for both the plaintiff and defendant having been heard, it is hereby

Ordered, Adjudged and Decreed:

#### I.

That the policy be reinstated and that the plaintiff beneficiary be awarded judgment in the full amount of the policy, namely Ten Thousand (\$10,000.00) Dollars, and that said amount shall be paid forthwith in accordance with the terms of the policy as follows: After deduction of attorney's fees:

(a) Fifty per cent (50%) to Marguerite May Donaldson; and

(b) Fifty per cent (50%) to Elmira Donaldson Lucker, as guardian of her three minor children and for the use and benefit of said children, Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson; that these payments under said policy shall be payable into the guardianship in the Superior Court of the State of Washington for King County, Cause No. 130706, in which Elmira I. Lucker has been appointed guardian of Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson, and in which guardianship proceeding the guardian is under bond for \$6,000.00 and is required to report to the Veterans Administration once a year and to the Court once every two years as to the use of all funds in said guardianship, all of which funds are for the benefit of the aforementioned three minor children.

## II.

That from this judgment the attorney for the plaintiff, John F. Dore, shall be allowed attorney fees in the amount of One Thousand (\$1,000.00) Dollars. That said attorney's fee shall constitute a lien upon the funds to be derived from the policy until said fees are paid.

Done In Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG,  
Judge

Presented by:

/s/ WILLIAM MULLEN,

/s/ JOHN F. DORE,

Attorneys for Plaintiff

Approved as to form:

/s/ JOHN A. ROBERTS, JR.,  
Asst. U. S. Attorney,  
Of Counsel for Defendant

Approved 3/21/56:

CLARKE, CLARKE &  
ALBERTSON,  
/s/ FRED C. CLARKE JR.,  
Attorneys for Intervenor

[Endorsed]: Filed and Entered Mar. 27, 1956.

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[Title of District Court and Cause.]

## MOTION FOR A NEW TRIAL

The defendant, United States of America, by its attorneys below named, move the Court that the judgment entered herein be vacated, set aside, and that a new trial be granted upon the following grounds and causes materially affecting the substantial right of the defendant.

(A) Errors in Law Occurring at the Trial as Follows:

1. The Court erred in finding that the insured, Allen Perry Donaldson, was permanently and totally disabled for National Service Life Insurance purposes at the time his insurance lapsed for non-payment of premium due on December 6, 1945.

2. The Court erred in finding that circumstances beyond his control prevented Allen Perry Donaldson from making application for waiver of premiums after September, 1948, and prior to his death.

3. The Court erred in concluding that Allen Perry Donaldson's National Service Life Insurance was in full force and effect on the date of his death and that judgment should be entered against the defendant herein.

(B) Newly Discovered Evidence Material to the Defendant's Case Which Could Not Have, With Reasonable Diligence, Been Discovered and Produced at the Trial.

This motion is based upon the files and records of the case and the affidavit of John A. Roberts, Jr., attached hereto and by this reference made a part hereof.

/s/ CHARLES P. MORIARTY,  
United States Attorney

/s/ JOHN A. ROBERTS, JR.,  
Asst. United States Attorney

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION  
FOR A NEW TRIAL

United States of America,  
Western District of Washington,  
Northern Division—ss.

John A. Roberts, Jr., being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, of counsel for the defendant herein, and as such states as follows:

That the record of this case clearly demonstrates that all evidence relating to the health and physical well-being of the insured, Allen Perry Donaldson, at the time of his discharge from the United States Navy, and at the time of the lapse of his National Service Life Insurance for non-payment of premium due on December 6, 1945, was completely normal, and that he exhibited and showed no signs of physical defects. The evidence further demonstrates that he was able at that time, and later, to secure and follow gainful employment. The record shows that it was not for a period of three years following the date of his discharge that the insured found it necessary to consult medical experts concerning his condition. Affiant states that such a record does not support the Court's findings as to total disability within the meaning of well-defined case law on the subject and as cited in the defendant's trial memorandum.

Your affiant further states that he believes the record of the trial of this action clearly demonstrates that in September of 1948 the insured, Allen Perry Donaldson, knew that he then had Hodgkin's disease and that he had originally contracted that disease while in the service of the United States Navy, in 1943. The evidence shows that at that time he gave a full Power of Attorney to the Veterans of Foreign Wars to prosecute his claims against the Veterans Administration. The evidence shows that while many claims in his behalf were filed with the Veterans Administration by the Veterans of Foreign Wars, the record is absolutely



silent as to any application made for waiver of premiums on the insured's National Service Life Insurance or for reinstatement of same.

Your affiant further states that on the day preceding the commencement of the trial of this action, he telephoned Elmira Donaldson Lucker, former wife of the deceased, insured Allen Perry Donaldson. Affiant states that the nature of the call was to determine whether or not Mrs. Lucker would appear as a witness for the plaintiff. Affiant states that Mrs. Lucker advised that she knew nothing whatever of the impending trial and that she desired to seek advice as to what rights, if any, she had in the action. On being so advised, your affiant did not feel it ethically proper to discuss the merits of the litigation with Mrs. Lucker and promptly advised her to contact private counsel in her behalf.

Affiant further states that at no time prior to nor during the trial did your affiant have an opportunity to discuss the case with Mrs. Lucker inasmuch as she was then represented by private counsel.

Thereafter, the records indicate that Mrs. Lucker made application for leave of the court to file a complaint in intervention. In furtherance of her application, Mrs. Lucker, on her oath, made her affidavit in furtherance of her motion for leave to file a complaint in intervention, Document No. 19 of the Court file. A copy of Mrs. Lucker's affidavit is attached hereto marked Exhibit A and by this reference made a part hereof as though fully set forth herein. Your affiant believes that the sworn statements contained therein constitute irrefutable



evidence of declarations or admissions against interest made by Allen Perry Donaldson concerning his National Service Life Insurance, to-wit, why he did not make application for waiver of premiums after September, 1948. Your affiant further states that a part of the record of this action is the application in furtherance of Intervenor's motion to intervene, Document No. 18 of the Court file, and to file her complaint in intervention and affiant, by this reference, incorporates herein as though fully set forth, paragraph IV and V thereof, being the verified allegations of Elmira Donaldson Lucker concerning knowledge conveyed to her by her husband with reference to his National Service Life Insurance and his intents concerning same after September of 1948.

/s/ JOHN A. ROBERTS, JR.

Subscribed and sworn to before me this 6th day of April, 1956.

[Seal] /s/ J. THORNBURGH,  
Deputy Clerk, United States District Court, Western District of Washington, Northern Division.

### EXHIBIT A

[Title of District Court and Cause.]

### AFFIDAVIT IN SUPPORT OF COMPLAINT IN INTERVENTION

State of Washington,  
County of King—ss.

Elmira Donaldson Lucker, being first duly sworn on oath deposes and says as follows:

That on October 14, 1944, she was married to Allen Perry Donaldson, then in the United States Navy. That shortly prior to this time, he had been ill, which illness was diagnosed as Hodgkin's Disease. That in the summer of 1944, he had a physical recheck by the Navy at Sand Point and was given a clear bill of health and advised that he did not have Hodgkin's Disease; that since he was apparently all right physically, your affiant and Allen Perry Donaldson were married on October 14, 1944.

That in early 1945, Marguerite May Donaldson, the mother of Allen Perry Donaldson, advised him, in the presence of affiant, to change the beneficiary on his National Service Life Policy to your affiant, and Allen Perry Donaldson at that time expressed his intention to change the beneficiary to your affiant. In October of 1945, when her husband, Allen Perry Donaldson, was discharged from the Navy, apparently with a clean bill of health, he again advised her of his intention that she be the beneficiary under his National Service Life Policy.

That in September 1948, when her husband, after re-diagnosis at the Veterans Hospital at Vancouver, Washington, was advised he had Hodgkin's Disease, he again expressed his intention of rechecking his National Service Life Policy rights to back pay and total disability; and both he and his father, while residing at 1113 Aurora Avenue, the home of his parents, stated to her, in the presence of the plaintiff, Marguerite May Donaldson, that they were going down to the VFW to check rights to insurance, changing the beneficiary to her for the benefit of the

children, rights to back pay and rights to total disability. That in September of 1948, in furtherance of this, Allen Perry Donaldson executed a Power of Attorney to the VFW, Form P22, on September 22, 1948, to do all things possible for him in this connection. That at this time, her husband advised her that there was nothing further he could do; that suit would have to be brought after his death to determine the questions in connection with the insurance.

That in June of 1949, her husband, Allen Perry Donaldson, at a time when they were living on Queen Anne Hill, again stated to her that he was going to check with the VFW in connection with the insurance, and advised her that there was no change in the status; that it was his understanding that suit would have to be brought after his death.

That her husband, Allen Perry Donaldson, the insured in the policy in question, was bed-ridden in bad shape from October 1951 until his death March 24, 1952, at which time, they were living at Alderwood Manor. That on more than one occasion, while he was bed-ridden, in the presence of your affiant and his mother, the plaintiff in this action, and his father, he expressed the desire that suit be brought on the insurance after his death and also the further desire that it be certain that the wife and children receive the proceeds of the insurance if the suit were successful; that both the plaintiff, Marguerite May Donaldson, and her husband, in the presence of Allen Perry Donaldson, and in the presence of your affiant, on these occasions, advised him

not to worry; that this would be done and the matter taken care of; that on or about March 24, 1952, your affiant and the plaintiff, Marguerite May Donaldson, and her husband, went to the Veterans Hospital in connection with the death of her husband, Allen Perry Donaldson; that at that time, the husband, Mr. Donaldson, in the presence of the plaintiff, Marguerite May Donaldson, and your affiant, stated that he was going to take care of the insurance personally and see that the wife and children were taken care of; that later on that date, March 24, 1952, the date of the death, and after the death of Allen Perry Donaldson on that date, the plaintiff in this action, Marguerite May Donaldson, stated to your affiant that they were going to bring an action on the insurance policy and see to it that your affiant and the children obtained the proceeds of the policy if the suit was successful.

Again, in April of 1952, the plaintiff in this action, Marguerite May Donaldson, stated to this affiant that she had received a denial of the insurance claim from the Veterans Administration and stated that action would be brought and that the wife and children would get the benefits of the insurance if the action was successful. That your affiant in July 1953, advised the plaintiff in this action, Marguerite May Donaldson, and her husband, that she was going to marry one George Luckner; that the plaintiff and her husband objected, thinking that this would give up certain rights that the children had through Social Security and the Veterans Administration; that the marriage to George Luckner took place Au-

gust 21, 1953; that no benefits were lost for the minor children of your affiant and her deceased husband, Allen Perry Donaldson, since the children were not adopted by her husband, George Lucker, so that these benefits still could be received. That from the date of the marriage to George Lucker, August 21, 1953, until about October 1955, your affiant saw very little, if anything of the plaintiff, Marguerite May Donaldson, and her husband, Mr. Donaldson. That in October of 1955 and Christmas of 1955, this affiant took the three minor children of herself and her deceased husband, Allen Perry Donaldson, to the home of his parents; that on these two occasions, nothing was said about the insurance claim. That your affiant next talked to the plaintiff in this action, Marguerite May Donaldson, on the telephone on or about January 17, 1956, discussing the children and a nephew. That the insurance and suit on the insurance was not discussed.

That on January 18, 1956, for the first time, your affiant heard about the pendency of the action on the insurance policy through an FBI agent calling on behalf of attorney John Roberts who was defending the action, who asked her if she knew about the suit on the insurance policy by the plaintiff in this action. She said she did not. Later on that same day, attorney John Roberts called her and said that he assumed she would appear as a witness in the trial in connection with the suit on the policy which was to be 1:00 P.M. on January 19, 1956; that your affiant was very surprised and she immediately on that same date endeavored to call the plaintiff in



this action, Marguerite May Donaldson; that the phone was disconnected and she accordingly drove out to the home of the plaintiff and her husband at Alderwood Manor; that she advised the plaintiff she had heard about the suit on the insurance policy and the fact that the trial date was 1:00 P.M. January 19, 1956, the next day. Your affiant asked the plaintiff if she remembered Allen's desire in connection with the insurance proceeds that they should go to her for the benefit of the children; the plaintiff stated that she did remember; your affiant then asked her "have you decided what you are going to do with the money if the suit on the policy is successful?"; that the answer to this question was evasive and plaintiff stated that there had been no decision made, and that the matter had not even been discussed, and also stated that she did not know the exact time of the trial and endeavored to change the subject.

That your affiant, immediately upon finding that apparently the situation was not as she thought it was and that the wishes of her deceased husband were not going to be carried out, immediately called the Veterans Administration attorney, Mr. Lester Pope, and explained the situation; that he advised the time was short and to contact an attorney; that she also called United States District Attorney John Roberts, defending this matter. He also said that the time was short. Your affiant then called attorney Fred G. Clarke, Jr., of Clarke, Clarke & Albertson, on the morning of January 19, 1956; that he accordingly prepared a Motion to Intervene



and a Complaint in Intervention and appeared in Court at 1:00 stating the position of your affiant and filed a Motion for Intervention and Complaint in Intervention.

ELMIRA DONALDSON LUCKER

Acknowledgment of Copy Received Attached.

[Endorsed]: Filed April 6, 1956.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR  
NEW TRIAL

This matter having come on duly and regularly for hearing before the undersigned Judge of the above entitled court upon motion of the defendant, United States of America, for a new trial, it appearing that heretofore judgment was entered duly and regularly against the defendant; plaintiff appearing through her attorneys, Yothers, Luckerath, Harris & Dore, and William H. Mullen, of counsel, defendant appearing by John A. Roberts, Jr., Esq., Assistant United States Attorney; argument of counsel being had, and the court being fully advised in the premises, now therefore, it is hereby

Ordered that the motion of defendant for a new trial be and the same is hereby denied.

Done In Open Court this 7th day of May, 1956.

/s/ WILLIAM J. LINDBERG,  
Judge

Presented by:

YOTHERS, LUCKERATH,  
HARRIS & DORE,  
/s/ By WILLIAM H. MULLEN,  
Attorneys for Plaintiff

Approved as to form:

CHARLES P. MORIARTY,  
/s/ By JOHN A. ROBERTS, JR.,  
Assistant United States Attorney

[Endorsed]: Filed and Entered May 7, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Marguerite May Donaldson, and to Yothers,  
Luck Rath, Harris & Dore, her attorneys.

Notice Is Hereby Given that defendant herein,  
United States of America, hereby appeals to the  
United States Court of Appeals for the Ninth Cir-  
cuit from that judgment entered in the above-enti-  
tled cause on the 27th day of March, 1956.

Dated this 5th day of July, 1956.

/s/ CHARLES P. MORIARTY,  
United States Attorney

/s/ JOHN A. ROBERTS, JR.,  
Assistant United States Attorney

[Endorsed]: Filed July 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith the following original papers in the file dealing with the action, as the record on appeal to the United States Court of Appeals at San Francisco, said papers being identified as follows:

1. Complaint, filed Aug. 10, 1954.
2. Marshal's Return on Summons, filed Aug. 12/54.
3. Answer of Defendant filed 2/15/55.
4. Reply, filed 6/15/55.
5. Praecipe, Ptff, for subpoenas in blank, filed 1/16/56.
6. Praecipe, Govt., for subpoenas, Williams, et al., filed 1/17/56.
7. Plaintiff's Memorandum, filed 1/17/56.
8. Defendant's Trial Memorandum, filed 1/18/56.
9. Marshal's Return on subpoenas, DeMarsh and Grobe, filed 1/19/56.
10. Marshal's Return on subpoena, Youngkin, filed 1/19/56.

11. Marshal's Return on subpoenas, Wilson, et al., filed 1/19/56.

12. Ptff's Supplemental Memo, filed 1/19/56.

13. Pre-trial order, filed 1/19/56.

14. Motion Elmira Donaldson Lucker to Intervene, filed 1/20/56.

15. Marshal's Return on Subpoena, Hall, filed 1/24/56.

16. Plaintiff's Brief in Summation, filed 1/30/56.

17. Defendant's Brief in Summation, filed 2/1/56.

18. Application in Furtherance of Intervener's Motion to Intervene and file Complaint in Intervention, filed 2/14/56.

19. Affidavit in Support of Complaint in Intervention, filed 2/14/56.

20. Memo. of Authorities and Brief State of Written Argument on behalf of Intervenor's Complaint in Intervention, filed 2/14/56.

21. Order Authorizing Intervention, filed 2/27/56.

22. Complaint in Intervention, filed 2/27/56.

23. Proposed Changes and Corrections Suggested by USA in Lieu of Findings and Conclusions Prepared by Plaintiff, filed 2/27/56.

Findings of Fact and Conclusions of Law proposed by Plaintiff, Lodged February 27, 1956.

Final Decree proposed by Plaintiff, lodged 2/27/56.

24. Answer to Complaint in Intervention, filed 3/9/56.

25. Motion to Dismiss Complaint in Intervention, filed 3/10/56.

26. Motion Plaintiff to Enter Judgment in Accordance with Decision of the Court.
27. Motion to drop Party Plaintiff, filed 3/13/56.
28. Motion Plaintiff to Dismiss, filed 3/13/56.
29. Stipulation of Settlement between Plaintiff and Intervenor and Order Dismissing Complaint in Intervention, filed 3/19/56.
30. Assignment, National Service Life Ins. Benefits, filed 3/23/56.
31. Findings of Fact and Conclusions of Law, filed 3/27/56.
32. Final Decree, filed 3/27/56.
33. Motion Defendant, for New Trial, filed 4/6/56.
34. Memorandum in Support of Motion for New Trial, filed 5/1/56.
35. Plaintiff's Memo of Authorities, filed 5/3/56.
36. Order Denying Motion for New Trial, filed 5/7/56.
37. Notice of Appeal by defendant, filed 7/5/56.
38. Motion Deft, to extend time to docket appeal, filed 7/25/56.
39. Order Extending Time to File Record on Appeal to 10/3/56, filed 7/25/56.
- 40-41. Court Reporter's Transcript of trial proceedings, filed 9/18/56.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal herein, to-wit:

Filing Notice of Appeal, \$5.00; and that said amount has not been paid to me for the reason that

the appeal herein is being prosecuted by the United States of America.

Witness my hand and official seal at Seattle this 28th day of Sept., 1956.

[Seal] MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy

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[Title of District Court and Cause.]

## TRANSCRIPT OF TRIAL PROCEEDINGS

had in the above-entitled and numbered cause, before The Honorable William J. Lindberg, a United States District Judge, at Seattle, Washington, commencing at 2:00 o'clock, p.m., on the 19th day of January, 1956. [1]\*

\* \* \* \* \*

### MARGUERITE MAY DONALDSON

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

#### Direct Examination

The Clerk: State your full name, please.

The Witness: Marguerite May Donaldson.

The Clerk: Marguerite, spelled M-a-r-g-u-r-i-t-e (spelling) ?

The Witness: M-a-r-g-u-e-r-i-t-e (spelling). [16]

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Marguerite May Donaldson.)

Cross Examination

\* \* \* \* \*

Q. (By Mr. Roberts): I will ask you, Mrs. Donaldson, if after 1948 if you knew that your son had Hodgkin's disease?

A. I didn't know it, no. I am not a doctor.

Q. What I mean is, you had knowledge that that was the diagnosis?

A. After it was diagnosed, of course.

Q. Do you recall after he was out of service do you recall the circumstances when you first learned it was diagnosed as Hodgkin's disease?

A. What circumstances do you mean? [49]

Q. How did that knowledge come to you?

A. They told me.

Q. Did your son tell you? A. Of course.

Q. And you earlier testified that—this may be hard—but that disease to your understanding is fatal? A. Always.

Q. Did you ever learn that from your son?

A. I learned that from doctors and my son, yes; he told me. [50]

WILLIAM NELSON DONALDSON

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, please.

The Witness: William Nelson Donaldson.

(Testimony of William Nelson Donaldson.)

Q. (By Mr. Dore): State your full name, please, Mr. Donaldson. A. William Nelson Donaldson.

Q. And where do you live, sir?

A. Route 2, Box 262, Alderwood Manor, Washington.

Q. And you are the husband of Mrs. Donaldson who just testified in this Court? A. I am.

Q. And what is your relationship to Allen Perry Donaldson, the deceased veteran in this case?

A. His father. [54]

\* \* \* \* \*

Q. How long was he at that hospital, if you recall?

A. '44; let's see, the war ended in '45. He wasn't there too long because he was sent to limited duty for six months and then he came back. [59]

Q. How did that happen?

A. They rediagnosed his case out there. [60]

\* \* \* \* \*

Q. How did he appear at times?

A. At times fine and at other times he would get irritable streaks and he would have headaches. They were periodical. They were not continuous but he would have those.

Q. Were they mild or severe?

A. Sometimes very severe from all appearances.

Q. Did you notice anything about his glandular system?

A. Yes, I did. I tried to talk Allen into turning in, in about what must have been two years before he turned into Vancouver in 1948. At times his

(Testimony of William Nelson Donaldson.)

glands in his neck were swollen and the glands under his arms and finally I persuaded him later on in 1948 to go down to Vancouver. Well, always he complained he had his family and insisted he was feeling fine but we knew he wasn't feeling fine and I guess he was just stubborn, if you want to put it that way.

Q. Did the swellings cause him any trouble? [65]

A. They caused him trouble to the extent he was unwell, and he still had these headaches. In the actual swelling of the glands, I don't believe he had any pain in those places but he would get awfully tired. He would get awfully tired. [66]

\* \* \* \* \*

Q. Any other jobs that you recall? Well, let's move on. Finally, it is shown in the record that has been stipulated to here, your son became ill again, did he not?

A. I beg pardon?

Q. Your son became ill again so that he had to be hospitalized?

A. Yes.

Q. And at that time what was his appearance and physical demeanor?

A. Very, very poor. His glands were badly swollen. I had to almost force him to go to Vancouver. At that time the Vet's hospital wasn't open here and he had to go down there.

O. And was there a reanalysis?

A. He was so bad that the Vet's hospital said they couldn't take him for a month or six [79] weeks and he was so bad I went to the Veterans

(Testimony of William Nelson Donaldson.)  
of Foreign Wars and they immediately——

Mr. Roberts: (Interposing) Objection.

*The Witness:* I think that will be hearsay testimony.

*The Witness:* I am telling you what I did.

Mr. Roberts: What you did, sir?

*The Witness:* Yes, what I did.

A. (Continuing) I went to the Veterans of Foreign Wars, to the relief officer, Walter Debach, and said, "This boy is awfully sick", and I said, "They tell him he can not get into the hospital for one month or two months it is so crowded." Then he checked and we got him in down there in a week's time.

Mr. Roberts: Down where?

*The Witness:* Into Vancouver.

Q. (By Mr. Dore): Vancouver, Washington?

A. That is right. That is the time they rediagnosed his case by biopsy *has* Hodgkin's again and reestablished the original diagnosis.

Q. Did you see the boy after that?

A. Oh, yes. He was down there on that [80] trip I think three or four weeks. They gave him treatment in Portland. [81]

\* \* \* \* \*

Cross Examination \* \* \* \* \*

Q. (By Mr. Roberts): Mr. Donaldson, you stated, I believe, that after your son's discharge from the Service a period of time went by and then he got progressively worse to the extent that you insisted he go to a doctor and even had to go to the

(Testimony of William Nelson Donaldson.)

V.F.W. to get permission to go to the Veterans Hospital; is that correct?      A. That is correct.

Q. That was sometime in 1948?

A. It was in 1948 when we finally convinced him that was what he had to do.

Q. So that a period of a little over three years elapsed from the actual date of discharge until he went to the doctor?

A. That is true. In the meantime I tried very hard to get him to go down there.

Q. I appreciate that; now, at or about the time he first went into the hospital there, and I [92] think as a result of your efforts probably in contacting the V.F.W., your son applied for disability pension as soon as he learned he had Hodgkin's disease, did he not?      A. That is correct. [93]

\* \* \* \* \*

Q. Now, Mr. Donaldson, after the disability award was made your son had to make further [97] applications as time and years went on to secure additional increases in the compensation, did he not, because of additional periodic increase or progression of his disease?      A. That is right.

Q. And you, in effect, assisted him in that regard, did you not?      A. I did.

Q. And counseled him concerning it?

A. That is right.

Q. At one point, also after September 1948, he went so far as to apply for vocational training with the Veterans Administration for the purpose of trying to learn the mechanical trade and was



(Testimony of William Nelson Donaldson.)

actually going to go to work for Vic Markov at one time?      A. That is right.

Q. And went to work for Universal Food?

A. He did.

Q. And he tried to better his status?

A. He did.

Q. And he did have quite a number of contacts with the Veterans Administration after 1948?

A. Yes, I believe he did.

Q. And as you testified he was receiving [98] disability as a triple amputee finally at the date of death, or just prior to that time?

A. That is right.

Q. During all this period and up before a reasonable time before his death there was never any question as to his mental awareness, or his ability—his sanity, put it that way? He knew the different between right and wrong and all that?

Mr. Dore: I will object to this as a triple question.

The Court: The Court will sustain objection as to form.

Q. (By Mr. Roberts): (Continuing) I will ask you this, Mr. Donaldson:

There was never any question as to whether your son was ever insane?      A. No.

Q. As a matter of fact, he was mentally competent, was he not, up until a reasonably short period of time before the disease crippled him?

A. Yes, up until the time they kept him under opiates, I will say that.



(Testimony of William Nelson Donaldson.)

Mr. Roberts: Yes. I have no further questions.

Redirect Examination

Q. (By Mr. Dore): When was that, Mr. Donaldson?

A. Well, I believe they were giving him opiates several weeks before he died, as I recall.

Mr. Dore: I have no further questions.

(Witness excused.)

Mr. Dore: I will call Dr. DeMarsh, please. [100]

QUIN B. DeMARSH

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Quin B. DeMarsh, D-e-M-a-r-s-h (spelling). \* \* \* \* \*

Q. (By Mr. Dore): What is your profession?

A. I do internal medicine and hematology. [101]  
\* \* \* \* \*

A. He was in the hospital two months before his discharge. He did not feel well in January of 1949 so he had apparently a reasonably good clinical remission for two years. In other words, to January, 1948.

Q. Is that unusual?

A. No. No, the only unusual thing about Allen is that most people with Hodgkin's disease do not have a remission—that is, from 1943 to 1947—of

(Testimony of Quin B. DeMarsh.)

five years. That is unusual. I have a patient, however, with the same disease who had—with surgical removal and treatment who had—a remission of about eighteen years before the disease again became apparent. She was observed for a time and then nobody paid any attention until about eighteen years later the disease started up again and the diagnosis was reaffirmed. That is an extreme. A five year remission after treatment I would say is unusual but not rare. [114]

Q. And then, after that remission, what occurred to him, according to the records?

A. Then he started to get into more and more trouble. In June, 1948, when I saw him he had headaches for several months and a bloody nasal discharge and many canker sores in his mouth and a poor appetite and lost weight. He had some sense of pressure in the upper chest, chronic cough in the morning with thick, mucus discharge or sputum, a little burning on urination and pain in the left thigh which awakened him at night.

Hodgkin's disease after a certain length of time—it will be confined in one area for maybe several years and then start to disseminate and then they develop generalized findings and symptoms of this disease.

Q. And was that happening to Allen?

A. Yes, he had a classical course for this disease and I saw him very frequently then after that time. [115]

\* \* \* \* \*

(Testimony of Quin B. DeMarsh.)

Q. Doctor, I think you wanted to make some correction there for the record?

A. Yes. I saw him first six-twenty-nine-forty-nine (6/29/49), rather than 1948. In the history given me he went back to the Veterans' Administration in August, 1948, when he noticed this [119] lump under the left arm rather than 1947. [120]

\* \* \* \* \*

Q. (Continuing) Considering the history and record as you have given it medically and as you observed it in the official records of the trial and of your own records pertaining to this certain case, and considering the work record which we will—which we shall not repeat—do you have an opinion based on some reasonable medical certainty from your examination and study of the case as to what in your opinion would be the disability, or the nature of the disability, of a person surrounded by such facts and circumstances?

A. Well, now——

Mr. Roberts: (Interposing) Objection.

The Court: Objection overruled. First, do you have an opinion?

The Witness: I have an opinion.

Q. (By Mr. Dore): What is that opinion?

A. My opinion—I would like to couch the question a little as to a hypothetical question concerning anybody with Hodgkin's Disease; they are, in essence, completely and totally disabled. Now, they have periods during the course of their disease [129] in which they are not. In fact, they feel well.

(Testimony of Quin B. DeMarsh.)

Mr. Roberts: Well, I object to the Doctor's answer and respectfully move it be stricken and request he answer the question as posed.

The Court: I will overrule the objection.

A. (Continuing) As it applies to this particular case, this boy does show what you would anticipate with a diagnosis of this disease. He had periods in which he was partially and also completely and totally disabled and certainly for the last three or four years of his life he was essentially completely and totally disabled. He couldn't hold a job and that is what you would anticipate. Also what you would anticipate, periods preceding the physical evidence of the disease, they have periods in which they don't feel well. You can not find very much to substantiate that period of disability and then in a few weeks or months out comes the evidence of the disease. That is my idea of the answer to the hypothetical question and also as it applies to this individual because he followed the typical course of this disease with the exception of a long remission originally. [130]

Mr. Dore: Any questions, Mr. Roberts?

Mr. Roberts: Yes, I have one or two, Mr. Dore. Have you completed?

Mr. Dore: I think I have. Go ahead.

Cross Examination \* \* \* \* \*

Q. (By Mr. Roberts): Your testimony is then that with relation to Hodgkin's Disease as it runs its course there may be periods of total disability and other periods of partial disability?

(Testimony of Quin B. DeMarsh.)

A. That is correct. [131]

\* \* \* \* \*

The Court: Would you say this, Doctor:

That a person afflicted with Hodgkin's disease is totally disabled?

The Witness: You mean the day you make the diagnosis?

The Court: No, when you conclude that; after you reach that diagnosis?

The Witness: You know he is disabled because of what is going to happen to him. He may be perfectly healthy. I have a number of people with Hodgkin's disease working every day. I have two or three at the Boeing Aircraft Company—engineers. They are working every day and they have [136] Hodgkin's disease. As a matter of fact, they feel fine but they are going to be partially disabled and then totally disabled and then dead. That is a foregone conclusion once the diagnosis is established. But, to say they are completely disabled from the day diagnosis is made until they are dead, that is not so, but you know they will as certain be. At the time you make the diagnosis many of them are in excellent health except they feel something in their neck or under their arm. Some of them actually when you make the diagnosis—we have such a patient, a young man who I believe is also at Boeing's, who was sick three or four months and his family physician didn't find much except fever and it was two months before anything came up that you could biopsy. His chest film was nega-



(Testimony of Quin B. DeMarsh.)

tive. I believe he developed an enlargement of his spleen. That man has been totally and continuously disabled from three months previous to the time the diagnosis was finally established and he remained disabled or maybe is dead. That is a period of over a year and the man has not worked a day. You have these extremes in which the diagnosis is present but it doesn't disable them too much at that moment, or it may not for three or four or five [137] and in some cases six years. That is the nature of the process.

I certainly—this boy was not disabled over a long period of time. It was not until 1945 or '6 that he began to have symptoms of recurrence and it was not until 1948 that he had objective evidence and a reestablishment of his diagnosis. From that time on the boy was, in my opinion, totally disabled.

The Court: From what time, Doctor?

The Witness: I would say sometime previous to 1948. That is a hard thing to pin down. His work record is poor and his work record in the Navy was poor. He apparently didn't feel well at that time but I have no personal knowledge of him at that time, nor did I take care of him. [138]

\* \* \* \* \*

### WILLIAM NELSON DONALDSON

upon being recalled as a witness for and on behalf of the Plaintiff, and having been previously duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Dore): Mr. Donaldson, I believe I forgot to ask you this yesterday:



(Testimony of William Nelson Donaldson.)

To your personal knowledge did your son, Allen Perry Donaldson, ever make out an application for waiver of his insurance premiums on this policy?

A. No, he never did.

Q. To your personal knowledge did he ever endeavor to do so?      A. Yes, he did.

Mr. Robert: Objection. The answer is "yes," I believe.

Mr. Dore: That is all he said.

The Witness: Yes.

Q. (By Mr. Dore): When and where was that done?

Mr. Roberts: I will object to the question unless proper foundation is laid as to who was present, the time, the place. [179]

\* \* \* \* \*

Q. (Continuing) Who was present?

Mr. Roberts: Very well.

The Court: You are amending your question? All right, go ahead.

The Witness: Should I answer?

Mr. Dore: Yes.

The Court: Yes.

A. My son and myself, Allen and I both. After the disease was rediagnosed definitely as Hodgkin's I personally took the stand and I did some checking that he should have been entitled to reinstatement and waiver of premiums.

Q. (By Mr. Dore): What did you do?

Mr. Roberts: I will object to that as not being responsive. I hate to be so technical but the

(Testimony of William Nelson Donaldson.)

question asked for when and where and who was present at the time the application was made.

The Court: It was a preliminary statement. What is the basis of your objection?

Mr. Roberts: The answer not being [182] responsive.

The Court: Objection overruled.

Q. (By Mr. Dore, Continuing): And what did you do; where did you go?

A. We went up to the Veterans Administration.

Q. Where was that located?

A. I believe in the Arcade Building. I think at one time I was in the Exchange Building and at another time in the Arcade Building.

The Court: That means you and your son, Allen?

The Witness: That is right, your Honor.

Q. (By Mr. Dore): What occurred on those occasions?

Mr. Roberts: I will object to that. I don't know when it took place.

Q. (By Mr. Dore, Continuing): Well, can you set the time any more definitely, Mr. Donaldson, than as you have?

A. I can not. As to date and hour, that is impossible.

Q. But you do know it was after the last [183] diagnosis of Hodgkin's disease?

A. That is correct, very shortly after.

Q. And what authorities did you see in the Exchange Building and/or the Arcade Building at the time?

(Testimony of William Nelson Donaldson.)

A. We talked to whoever was in charge. I don't recall the name and they got out the book and we explained our situation to them and they got out and showed us that the waiver period had expired and that there was nothing we could do, and Allen accepted that at the time.

The Court: What was that?

The Witness: Allen accepted that statement at the time which I didn't.

Q. (By Mr. Dore): Did you later then make application?

A. Yes. I went to the Veterans of Foreign Wars who at that time had power of attorney for Allen's case.

Q. When was this now?

A. It was shortly after this period; it must have been in 1948 or '9.

Q. Was this after Allen died?

A. No, originally, and after Allen died I went to the Veterans of Foreign Wars and we filed [184] our claim, which was denied, and I still felt that we had a just claim and we appealed it and the claim was denied and also the appeal was denied, after which I still believed we had a claim and I consulted with yourself.

Mr. Dore: Any questions, Mr. Roberts?

#### Cross Examination

Q. (By Mr. Roberts): As I understand your testimony, Mr. Donaldson, you state that you and your son went to either the Arcade or Exchange Building sometime after the rediagnosis in 1948?

(Testimony of William Nelson Donaldson.)

A. That is right.

Q. You don't know who you talked with but you did talk with somebody?

A. That is right.

Q. And you were talking with somebody you believe in the Veterans Administration?

A. That is right.

Q. And you asked them about reinstating his insurance, is that right?

A. That is right, and waiver of premiums.

Q. And they advised you, whoever it was, you do not recall who it was, that he didn't have a right to reinstate? [185]

A. That is right.

Q. And that that was the last of it; that is, the last Allen ever did about it; is that correct?

A. To my knowledge, I think that is correct.

Q. And you can't help me any further in telling me who this party was?

A. No, I can't. At the time I didn't take name or dates or anything else at the time. We had to assume through—you might say through—ignorance of the law and such as that that such was the case. However, I had——

Q. (Interposing) Let me—I know you appreciate my problem as I appreciate yours. I have made the complete original file of the Veterans Administration's Office concerning your son available to you, haven't I?

A. That is correct.

Q. And you studied it over a period of two days, haven't you?

A. Yes. [186]

\* \* \* \* \*

(Testimony of William Nelson Donaldson.)

Q. I will ask you, Mr. Donaldson, if you were able to find anything in this file concerning such a meeting? A. No.

Mr. Dore: I will object to that, your Honor.

The Court: Objection overruled.

Q. (By Mr. Roberts): Further, it is a fact, is it not, Mr. Donaldson, as you testified, that the Veterans of Foreign Wars during this period and before your son's death had a general power of attorney for him concerning his claims to the Veterans Administration? A. That is right.

Q. And you had occasion to go out and examine their files and records and to talk to their personnel in an effort to determine whether that [188] organization made any application for reinstatement or waiver of premiums; is that true?

A. It is not entirely true. I went to them. I don't know that there is any record made of it. I do know they looked it up in the regulations at that time. Whether anything was put down in writing or formal application made, I can't answer that. We weren't, you know, of a legal mind. As a consequence we went for information and if somebody told us something we had to accept it as being what it was.

Q. It is a fact at that time the Veterans of Foreign Wars were assisting Allen in his disability representations to the Government?

A. That is correct.

Q. At that time? A. That is right.

Mr. Roberts: I have no further questions.



(Testimony of William Nelson Donaldson.)

The Court: Mr. Donaldson, you state that this inquiry was made after the diagnosis—I mean, after the last diagnosis?

The Witness: That is correct, your Honor.

The Court: May I have the exhibit? [189]

The Witness: I might explain that, if I may.

(Whereupon, there was a brief pause.)

Mr. Dore: Will you mark that, please?

The Court: Counsel, I am referring to Exhibit A-2. That is the application for pension, or compensation because of disability. I am looking for the date.

Mr. Roberts: I have examined that for a date and don't find one. There are time stamps by offices on the back.

The Court: September; is that 1948, have you ascertained?

Mr. Roberts: That is correct, your Honor, 1948.

The Court: I am referring now, Mr. Donaldson, to this Veterans application for pension or compensation which is in the record as Plaintiff's Exhibit A-2. You have seen that, have you?

The Witness: No, I haven't, your Honor. I haven't seen the application. I believe at one time——

The Court: (Interposing) It bears date September 16, 1948. That was about the time that he went into the hospital and it was about that time [190] that this diagnosis——

The Witness: (Interposing) I believe it was



(Testimony of William Nelson Donaldson.)

executed while he was in the hospital at Vancouver, as I recall, for the rediagnosis his first trip.

The Court: Now, you state that the conference you had with the representative of the Veterans Bureau, or Department, or Administration, was after he returned from that hospitalization?

The Witness: Yes, your Honor.

The Court: Have you any way of relating it at all, whether it was within a year or two? Certainly there was some time between.

The Witness: Very shortly after he returned from the hospital at Vancouver. If I may go back, your Honor, I think maybe I can clarify it. I am inclined to be a little insurance minded because I sold insurance at one time. I assumed—we had to assume—during the period due to the change of diagnosis of his disease from Hodgkin's to lymphadenitis that he had no grounds for waiver. That is the argument I used with the Veterans Administration. They said, "Why didn't you come in?" If now it is determined it is one hundred per cent [191] fatal disease, there is no cure. They have periods of remission but to all intents and purposes, from an insurance standpoint, he was entitled to one hundred per cent disability and waiver of premiums on the original diagnosis. It wasn't his fault that the other doctors made an error in re-diagnosing his case. They said, however——

The Court: (Interposing) You say "they"; who?

The Witness: The people we were talking to in the Veterans Administration. The period had gone

(Testimony of William Nelson Donaldson.)

by where he could ask for a waiver. If I recall it correctly, you have one year to apply for that waiver. Well, during this period we didn't know, had no way of knowing, that we had any grounds to ask for a waiver and so, when it was rediagnosed and determined definitely he had Hodgkin's, and had had it originally, then I felt it should be retro-active to the original period and they told me no; and that has been my contention right from the start on through this thing. They apparently stood on a technicality.

The Court: Just a minute. We don't want "apparently"; what I want is what transpired, what you said. [192]

The Witness: This was a part of the conversation I had with the Veterans Administration. They then said, and read the memorandum to me, that that he had not applied within the stated period required.

Mr. Roberts: Your Honor——

The Court: (Interposing): You have no recollection or you can't identify this person?

The Witness: It would be utterly impossible, your Honor, no.

Mr. Roberts: I have to restate my objection. I appreciate the witness' difficulty in recalling but I believe the foundation is not properly laid and it should be more specific. There is no way that I can cross examine such testimony. There is no way I can identify the parties.

The Witness: I can identify the Veterans of

(Testimony of William Nelson Donaldson.)

Foreign Wars man I talked to on it; he is in the city.

The Court: This was a conversation you had with him with your son not present?

The Witness: My son was present, several times.

The Court: This was the Veterans of Foreign Wars? [193]

The Witness: Not it all, but when it concerns the Veterans Administration——

The Court: (Interposing) Do you have the place definitely in your mind, or not; the office?

The Witness: The Veterans Administration Office?

The Court: Yes.

The Witness: I am almost positive it was in the Arcade Building, but I wouldn't want to take a life and death oath on that, but I am quite sure it was in the Arcade Building.

The Court: You have no way of refreshing your recollection to identify the person, either by description—you, of course, don't know his name?

The Witness: No.

The Court: Or by description?

The Witness: Your Honor, I don't believe if he walked into this court room I could identify him.

The Court: Was that only one occasion?

The Witness: There was only one occasion up there.

The Court: You and your son together? [194]

The Witness: Yes, that is right.

(Testimony of William Nelson Donaldson.)

Mr. Roberts: May I ask one or two questions, your Honor?

The Court: Yes.

Mr. Roberts: It might clarify Mr. Donaldson's recollection.

Q. (By Mr. Roberts): Your son worked with a fellow by the name of—

Mr. Roberts: Strike that.

Q. (By Mr. Roberts, Continuing): —with a man by the name of Joseph A. Martino at the Veterans of Foreign Wars; do you recall the name of Joseph A. Martino?

A. Yes, I know him very well.

Q. He was a contact man at the Veterans of Foreign Wars? A. Yes.

Q. Isn't it a fact, Mr. Donaldson, that Mr. Martino got out the law book, so to speak, and read the regulation with you and that that is the meeting you are thinking about when you say you went over the law?

A. No, indeed not, it is not, because we went up there afterwards. I talked to Walter DeBach and [195] Walter read it to me and we undoubtedly had conferences with Joe Martino. I went up to the Veterans of Foreign Wars—well, let's put it—to seek more pressure.

Q. But they never did, apparently?

A. Just what they did, I don't know.

Q. To your knowledge?

A. They informed me that the waiver period had expired. [196] \* \* \* \* \*

ELMIRA LUCKER

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

\* \* \* \* \*

Q. (By Mr. Mullen): During that time was there any change in his physical condition?

A. No; just the same complaints except that [220] he was shaving one morning and noticed a big lump under his left arm and he immediately knew what that was.

Q. And then what did he do?

A. He called the Veterans Administration right away and they wanted him to file papers and they said it would take six weeks to get in the hospital and he went to the V.F.W. and they got him in the hospital the following Monday in Vancouver.

\* \* \* \* \*

OPINION

The Court: Gentlemen, I think I can give you my decision on this.

To begin with, the Court is of the opinion that this a very close case, particularly in light of the recent decisions in the Landsman case and more particularly the Kershner case in our own circuit.

As I indicated at the outset of the argument this afternoon, the two principal issues to be resolved are, first, the total disability of the insured at the time the insurance lapsed and, second, whether or not his failure to make application for waiver of



premiums was due to some circumstance beyond his control. As I understand, both Counsel agree that those are the two critical or vital issues to be decided.

The Plaintiff can not recover unless there was total disability prior to the lapse of the policy which occurred shortly after the time of his discharge.

In reaching a decision on that matter the Court has taken into consideration the medical record which showed the diagnosis of Hodgkin's disease back in 1943; Dr. DeMarsh's testimony as to what the disease and its effects and course are; the work record of the insured or the deceased veteran; and, likewise, the definition as given in the Code of Federal Regulation, as well as the various opinions of the courts with respect thereto.

As best I can determine it, the insured was, for the purposes of continuous substantially gainful occupation, totally disabled at the time he was discharged from the Navy.

I find that at the time of his discharge and at the time his insurance lapsed, insured was suffering from Hodgkin's disease.

The disease itself, while it may not totally disable a person from working, is fatal and places serious handicaps on his employment. The course of the disease may run a matter of two, six, eight years; in this case nine years, approximately. The Doctor testified in a very unusual case to his knowledge a patient had lived eighteen years; further, that in this case the disease ran unusually long



course with an unusually long period of recession [283] after the initial diagnosis.

It appears to me that the work record here, while showing the young lad held down jobs it also indicates irregularity and lack of capacity.

It is the Court's opinion, from the testimony of the mother, the father, and the wife that the boy was not well from the time he came back after he was first diagnosed as having had Hodgkin's disease. The periods of time worked, including time lost, the mental and physical condition of the insured when he came home—that is, his exhaustion, headaches and irascibility—all those factors indicate to me that this boy, while determined to make a go of it, if possible, was working under handicaps that were, in fact, disabling.

The fact that he was discharged as being fit in October, 1945, would give him cause to believe that he was all right and a young man, recently married as he was and about to begin his career after discharge from the Service, could, with the natural determination that would exist in such a situation, overcome tremendous obstacles through sheer mental effort. Under the circumstances it is reasonable to believe he would not permit himself [284] to think he was suffering from a dreadful affliction such as Hodgkin's disease. The pattern of work indicates to me that he was afflicted with a disabling disease and that even though working with great courage he was, in fact, totally disabled from following for a period in excess of two or three months with efficiency any substantially gainful

occupation at the time his insurance lapsed, and, likewise, that this disability, with varying degrees of acuteness, continued in fact from that time to his death in 1952.

Now, the question of whether or not there was any circumstance beyond his control which caused him to fail to make timely application for waiver of premiums:

It is the Court's finding that because of the failure of the Navy to sufficiently examine the insured and diagnose the ailment of the diseased veteran Donaldson at the time of his discharge in 1945 that Donaldson was unaware of his fatal disease and had reason to believe that he was fit. The pronouncement of the medical officer of the Navy of the insured's physical fitness, understandable as it may be, was a circumstance beyond the control of the insured and in itself probably accounted in [285] large part for the determination of this young man to overcome whatever it was that was sapping his vitality and to cause him to fail to recognize he was disabled and resulted in his almost heroic efforts to take his place in life. Because of that failure in diagnosing the disease and the resulting discharge as a fit person it may be assumed he did not make the application for a waiver of premiums which, under the statute, should have been made if he were totally disabled sometime within a year from August, 1946. The insured, because of this misleading circumstance, as the Court views it, had reason to believe that he was not totally disabled and, therefore, did not conceive that he had the right to

make application for the waiver of premiums and I find, therefore, that circumstances beyond his control were such as to cause him to fail to make timely application for waiver of premiums because of total disability at time of lapse, or at any time thereafter until death.

The fact that he may have fully appreciated that he was totally disabled from 1948 on wouldn't, as I see it, necessarily make him aware of total disability at the time of lapse or before August, 1947, and there is nothing in the record to [286] indicate that he was advised that, or that he should have known that, he was continuously or totally disabled as of the date of the lapse or any time prior to September, 1948.

So, therefore, the Court finds for the Plaintiff.

Does that give you sufficient from which to make your findings?

Mr. Dore: Yes, your Honor.

Mr. Roberts: I was wondering, your Honor and Mr. Dore, I am not sure—maybe I missed some of the remarks of the Court relative to the period after September, 1948—I don't know if your Honor covered the circumstances beyond his control at that time.

The Court: The circumstances beyond control, as I find here, were the circumstances resulting from the Navy's failure to properly diagnose the insured's ailment which led him to be of the opinion that he wasn't suffering from Hodgkin's disease from the period of his discharge until the time he made application to the Veterans Hospital for

treatment when he did learn that he did have Hodgkin's disease. However, that was in October, or September, rather, of 1948 when time for making [287] application for waiver had expired unless he had been and knew he had been continuously and totally disabled at the time he left service or, rather, at the time of the lapse of his insurance.

Mr. Roberts: So, do I understand the Court, the Court does not feel it necessary to comment on whether or not the Defendant was entitled—the Plaintiff, rather—the insured was entitled to make application for waiver of premiums after September, 1948? It is my understanding of the law——

The Court: (Interposing) I think he was, under the law, entitled to make that application if he were totally disabled at the time of his discharge; but the Court's further finding is that the fact that he was found to have Hodgkin's disease in 1948 did not in and of itself make this insured aware of the fact that he may have been continuously and totally disabled at the time of his discharge, or lapse of his insurance, because he was discharged after medical examination by the Navy as being fit and he in his own mind may have therefore believed he was not totally disabled, whereas, in fact, he was.

I don't know whether you follow the [288] Court's reasoning or not.

Mr. Roberts: I wanted to clearly state it as I feel it should be.

The Court: I think it should be too.

Mr. Roberts: In other words, the application

made after September, 1948, would be an application for waiver of premiums due December 6, 1945?

The Court: 1945. There is nothing in the evidence, as I state, to indicate that this boy had been advised that this Hodgkin's disease totally disabled him as of the date of discharge; the evidence is to the contrary.

Mr. Roberts: Then as I understand the Court, the finding is that lack of knowledge of the totally disabling characteristics of Hodgkin's disease is a circumstance beyond the insured's control?

The Court: Well, no, the circumstance beyond the insured's control is the circumstance of his discharge by the Navy as fit after having been diagnosed as having Hodgkin's disease. The Court's finding that he had Hodgkin's disease throughout is based on the testimony of the Doctor DeMarsh and the medical records. However, the [289] Navy having found him fit discharged him and for a period of three years the insured went on making every effort to support himself and family without going to a doctor. Finally in 1948 when he had to see a doctor and learned of his disease, his insurance had lapsed. At that time he had no right to ask for waiver of premiums unless it could be shown that he was totally disabled at the time the insurance lapsed. As I have stated, it is only reasonable to assume that the lad did not know, was not aware of, his total disability and actually there is nothing in the evidence to indicate that he at that time knew that he had no chance of recovery. Maybe he was,



but there is nothing in the evidence to establish such knowledge.

Does that sufficiently cover it?

Mr. Dore: Yes, your Honor. Thank you.

The Court: I feel it is a rather close case, Gentlemen, but in view of the liberal decision of our Court of Appeals it seems to me that the Kershner case gives indication of the way this case should be decided. [290]

\* \* \* \* \*

The Court: As I viewed it, in 1948 he finally said he was disabled or had Hodgkin's disease and probably would be all through, so to speak. There was indication, if anything, that—from testimony that may not have been stricken, that his efforts to reinstate his insurance, according to his father, as I recall, met with the response that it was too late or that it couldn't be renewed, or something of that character. I don't know how much of that testimony stayed in. That to me is a reasonable assumption to make from the facts that are established. The important thing is that when he could have renewed, he didn't have reason to believe— [346] at least that is the way I put it—that he was entitled to it. [347]

\* \* \* \* \*

The Court: Well, this matter has been before the Court on several different occasions.

I recognize that the Court in this case has probably gone further than any other court in which a decision has been reported but I reached the decision following what I conceived to be the letter as



well as the spirit of the Kirshner case in this Circuit. [384]

\* \* \* \* \*

[Endorsed]: Filed Sept. 18, 1956.

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PLAINTIFF'S EXHIBIT No. 9

REPORT OF CONTACT

Date: 11-14-52

Name: Allen P. Donaldson. No. 14,494,247.

\* \* \* \* \*

Give brief statement of information requested and given:

It is believed that the evidence of record meets the requirements of the National Service Life Insurance Act of 1940 as amended and waiver of Premiums is in order.

Kindly furnish our Organization with a copy of the notice of decision when rendered.

[In longhand]: No comment.

Filed 11-14-52.

/s/ [Illegible]

Ass't NCO V.F.W.

[Stamped]: Ready for File. Dis. Ins. Claims Div. Nov. 14, 1952. No ans. nec. J. C.

## DEFENDANT'S EXHIBIT No. A-2

Cause No. 3760

Claim No. 14,494,247

Veteran's Application for Pension or Compensation for Disability Resulting From Service in the Active Military or Naval Forces of the United States

Penalties Provided in Public Acts Covering Pension and Compensation

The assignment or transfer of any right or interest in any pension is void and has no effect. Any person who shall pledge or receive a pledge covering the transfer of any right or interest in any pension, or who holds the same as collateral security for a debt, shall be guilty of a misdemeanor and upon conviction shall be fined a sum not exceeding \$100 and the cost of the prosecution.

Any person who knowingly or willfully makes or aids, or assists in the making or presentation of any false or fraudulent affidavit or writing purporting to be such, concerning any claim for pension, or any person who knowingly certifies that the declarant, affiant, or witness named in such declaration, affidavit, etc., appeared before him and was sworn thereto, when in fact such affiant or witness did not so appear, shall be punished by fine not exceeding \$500 or by imprisonment for a term of not more than 5 years.

Any fiduciary or other person having charge and custody in such capacity of the pension of his ward,

who shall embezzle the same or fraudulently convert the same to his own use, shall be punished by fine not exceeding \$2,000 or imprisonment at hard labor for a term not exceeding 5 years, or both, at the discretion of the court.

That whoever in any claim for benefits makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 2 years, or both.

That if any person entitled to payment of pension, whose right to such payment ceases upon the happening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than 1 year, or both.

While a claimant has a right, if he so desires, to employ a duly recognized pension attorney or pension claim agent to assist him in prosecuting his claim, it is not necessary that he incur this expense, and any attorney or agent so employed may not legally charge any fee other than that allowed and paid by the Veterans Administration.

Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under this title, shall

forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.

You must furnish all the information required in this application and every question must be answered fully and clearly. Answers must be written in a clear, legible hand or typewritten. If you do not know the answer to any question, say so. If any of the questions are not clear and you desire further information before attempting to answer the question involved, you should write to the Veterans Administration office having jurisdiction over the territory in which you reside for further instructions.

If you need more space to answer any items, attach a piece of plain paper numbering answers to correspond with the items.

Attach to this application any affidavits or papers which may help to show that you have a disability, resulting from military or naval service.

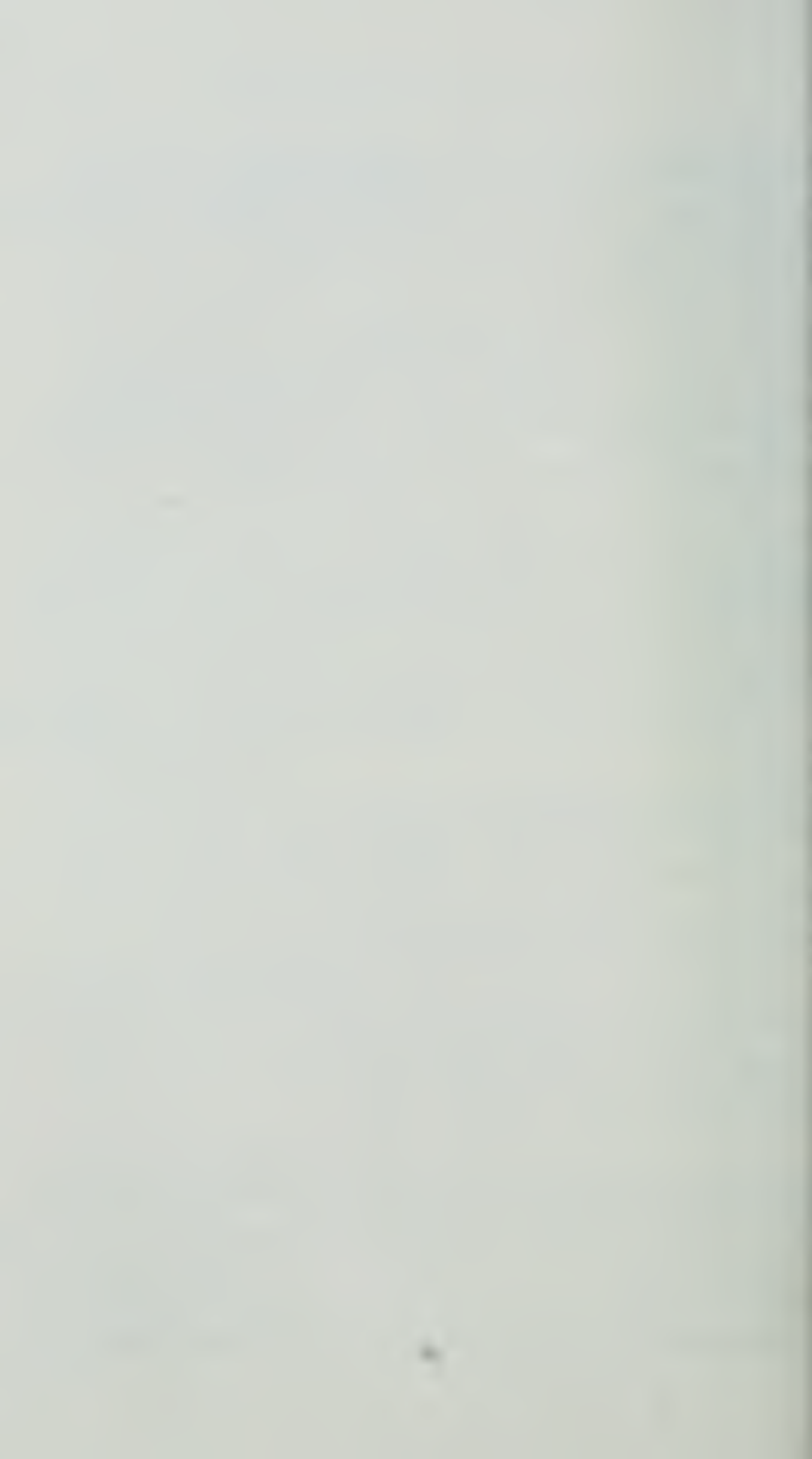
[Stamped in margin]: Military File searched  
( v ) Record found. Date 9/9/48. D. C. T.

I hereby make application for compensation or pension based on military or naval service.

1. Name—First name—Middle name <b>Randson, Allen Perry</b>			2. Address (Number, street, city or town, State) <b>16802-15th NE Seattle, Wash.</b>			
3. Are you a citizen of the United States? <b>Yes</b>			4. Native-born or naturalized? <b>Native born</b>		5. If naturalized, state date and place	
6. Date of birth <b>11/14/20</b>			7. Place of birth <b>Duluth, Minnesota</b>			
Description as of date of last enlistment						
8. Sex <b>Male</b>		9. Race <b>White</b>		10. Height <b>5'9 1/2"</b>		
11. Weight <b>175 lbs.</b>		12. Color eyes <b>Grey</b>		13. Color hair <b>Brown</b>		
14. Complexion <b>Ruddy</b>		15. Are you registered under Selective Service Act? (Yes or no.) <b>No</b>				
16. Branches of service in which you served: <input checked="" type="checkbox"/> Navy <input checked="" type="checkbox"/> Marine Corps <input checked="" type="checkbox"/> Coast Guard <input type="checkbox"/> Nurse Corps <input type="checkbox"/> Other (specify) <b>Reserve</b>			17. Address of draft board with which you registered. (If none, so state.)			
18. Home address at time of registration						
19. Entered service <b>Place</b> <b>Seattle</b>		20. Serial No. <b>664-00-5919045</b>		21. Separated from service <b>Date</b> <b>Jan 4/ 1945</b>		
22. Grade and organization <b>San Diego P.F.C. - USMC</b>		23. Character and type of discharge <b>Honorable</b>				
24. If you served under another name, state name and period of service.		25. If reservist, give periods of active duty and branch of service. <b>USMC RN 17 to Jan 6 1941 to 9 Mar 41 to 19 Oct. 1941</b>				
26. State all periods of inactive duty <b>none</b>		27. Do answers above cover all periods of your service—active, inactive, or reservist? (Yes or no.) <b>Yes</b>				
28. Have you ever applied for any of the following benefits? (Yes or no.)						
29. Allowance for compensation or pension <b>no</b>		30. Regular service retirement pay <b>no</b>		31. Emergency officer's retirement pay <b>no</b>		
32. Retainer pay <b>no</b>		33. Insurance benefits or waiver of premium, National Service Life Insurance <b>yes</b>		34. Hospital treatment or dental care <b>yes</b>		
35. U. S. employees' compensation <b>no</b>		36. Civil Service Retirement annuity <b>no</b>				
29. Any of the answers under item 28 are "yes," answer the following:						
37. Application <b>no</b>		38. Claim No. <b>no</b>		39. Office with which filed <b>no</b>		
40. Have you ever been physically examined for the following? (Yes or no.)						
41. Administrative Commission <b>no</b>		42. Civil Service Commission <b>no</b>		43. Former Pension Bureau <b>yes</b>		
44. Enlisted Reserve Corps <b>no</b>		45. Officers' Reserve Corps <b>no</b>		46. U. S. Employees Compensation Commission <b>no</b>		
47. Other (specify) <b>Public Seamen's Board Maritime Comm.</b>						
48. Any answers under item 40 are "yes," state date and place of examination. <b>5 Sept. 1947 Seattle, Wash. Maritime Comm.</b>						
49. Nature of disease or injury on account of which claim is made and date each began. <b>Hodgkins Disease Sept 1943</b>						
50. If you received any treatment while in the service, give name, number or location of hospital, first-aid station, dressing station or infirmary, or the organization to which it was attached, the dates of treatment, and nature of sickness, disease, or injury. <b>Base Hospital #3 - Hodgkins Disease 3 Sept. 1943 to 14 Sept 1943</b>						
<b>H. Oakland, Calif. " 17 Sept 1943 to Nov. 20, 1943</b>						
<b>H. Seattle, Wash. " 20 Nov. 1943 to 15 Jan 1944</b>						
<b>" " 8 July 1944 to Aug 1944</b>						

CONTINUE REMARKS IN BOX 70

16-58500-4





Have you a child or children living under 18 years of age and unmarried or any child of any age who is insane, idiotic, otherwise permanently helpless? If so, state the following particulars about each child.

FULL NAME OF CHILD	70. DAYS OF BIRTH			71. PLACE OF BIRTH	72. NAME AND ADDRESS OF PERSON WITH WHOM CHILD LIVES
	DAY	MO.	YEAR		
<i>Allen Perry Donaldson</i>	<i>9</i>	<i>4</i>	<i>47</i>	<i>Seattle</i>	<i>Parents</i>
<i>Isabelle Marie Donaldson</i>	<i>12</i>	<i>7</i>	<i>48</i>	<i>Seattle</i>	<i>Parents</i>

State your father's name and address <i>W. N. Donaldson</i>	<i>1113 Aurora</i>	Date and place of birth <i>Seattle</i>	Is he dependent on you for support? <i>no</i>
State your mother's name and address <i>W. H. N. Donaldson</i>	<i>1113 Aurora</i>	Date and place of birth <i>Seattle</i>	Is she dependent on you for support? <i>no</i>

State full name and complete address of nearest relative at date this claim is filed *14002 - 15 Th. N.E.*  
*Mrs. Elvira L. Donaldson Seattle 55 Wn.*

I HEREBY CERTIFY that I (have read) (have had read to me) all questions and answers thereto embodied in this application; that answers to all above questions are true and complete to the best of my knowledge and belief; that all available information in support of this application is contained in the foregoing statements which are made as part thereof with full knowledge of the penal provisions for making a false statement as to a material fact as printed on Page 1 of this application.

*Allen Perry Donaldson*  
(Signature of claimant)

\* Delete inapplicable words.

Use this space for any remarks (continue items by box number).

U. S. GOVERNMENT PRINTING OFFICE 16-60898-4

Defendant's Exhibit No. A-2—(Continued)





DEFENDANT'S EXHIBIT No. A-3

Veterans Administration

AWARD OF DISABILITY COMPENSATION  
OR PENSION (Service Connected)

Regional Office 1506 Textile Tower, Seattle 1,  
Washington

October 26, 1948

File No. 14,494,247

To: Mr. Allen Perry Donaldson,  
16802 15th North East, Seattle, Washington

In accordance with the provisions of Public 2, 73rd Congress as amended you are hereby notified that as a veteran who was discharged from the military service of the United States on the 19th day of October, 1945, you are awarded disability compensation in the amount of \$138.00 from September 2, 1948, on account of disability resulting from the following conditions held to have been incurred or aggravated during your military service, Hodgkin's Disease.

The monthly payments pursuant to this award will continue during the period in which you are \$138.00 disabled subject to the general conditions mentioned on the reverse side of this communication to which your attention is directed. Upon the happening of any of the contingencies mentioned the Veterans Administration should be notified promptly.

If you are dissatisfied with the findings of the Veterans Administration or the amount of this award it is your privilege to enter an appeal there-

## DEFENDANT'S EXHIBIT No. A-6

To: Rating Board

Nov. 8, 1948

From: Veterans of Foreign Wars

This file is hereby submitted for the consideration of the Rating Board.

Walter A. Deebach,  
Department Service Officer, Department of Washington, Veterans of Foreign Wars.

[Stamped]: File Nov. 9, 1948. HBB.ADJ.

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[Endorsed]: No. 15308. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Marguerite Allen Donaldson and Elmira Donaldson Lucker, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 29, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15308

UNITED STATES OF AMERICA, Appellant,  
v.  
MARGUERITE MAY DONALDSON, Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

The appellant will urge the following points in the appeal of the above-entitled case:

1. The District Court erred in holding that the insured veteran was prevented from applying for waiver of premiums on his lapsed NSLI policy by circumstances beyond his control, at a time when he knew that he was totally disabled.

2. The District Court erred in awarding appellee's counsel twenty per cent of the judgment entered on her behalf, rather than the ten per cent maximum allowed by statute.

3. The District Court erred in denying appellant's motions to reopen the hearing on the basis of newly-discovered evidence and for a new trial.

/s/ CHARLES P. MORIARTY,

United States Attorney,

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney,

Of Counsel for Appellant

Acknowledgment of Copy Received Attached.

[Endorsed]: Filed Nov. 2, 1956. Paul P.  
O'Brien, Clerk.

